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No. 81-2286

In the Supreme Court of the United States

OCTOBER TERM, 1982

LUIS OSCAR SARMIENTO-PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals was correct when, after finding reversible error in the admission of certain evidence at petitioner's trial, it refused to pass on petitioner's claim that the remaining evidence was insufficient to support his conviction and rejected his claim that retrial would be barred by double jeopardy principles if the remaining evidence was insufficient.

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OPINION BELOW

The opinions of the court of appeals (Pet. App. 1-8, 21-54) are reported at 667 F. 2d 1239 and 633 F. 2d 1092.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1982. A petition for rehearing was denied on April 15, 1982. The petition for a writ of certiorari was filed on June 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of two counts of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of conspiracy to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to three concurrent terms of

15 years' imprisonment and to special parole terms totalling ten years. He was also fined $15,000. The court of appeals reversed petitioner's convictions and remanded for a new trial (Pet. App. 54), holding that the district court had erred in admitting into evidence a confession that incriminated petitioner, made by Robert Aguilar, a co-defendant who had pleaded guilty and refused to testify at petitioner's trial on Fifth Amendment grounds (see Pet. 3-5). Aguilar's confession had been admitted under Fed. R. Evid. 804(b)(3) as a statement against penal interest by an unavailable declarant. Without reaching the question whether the Confrontation Clause had been violated, the court of appeals concluded (Pet. App. 31) that the confession lacked sufficient indicia of reliability to warrant its admission under an exception to the hearsay rule.

The court of appeals did not address petitioner's claim that the remaining evidence was insufficient to support his conviction.[1] However, in rejecting the government's harmless error argument, the court remarked that the remaining evidence "may or may not have been sufficient to submit the cocaine distribution charge to the jury" (*id.* at 53). Petitioner filed a petition for rehearing asking that the court of appeals rule on the sufficiency issue, but rehearing was denied without comment.

After remand, petitioner moved the district court for dismissal of the indictment on double jeopardy grounds. He contended that the inadmissible confession was the most crucial evidence adduced against him at the first trial, that

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[1] Petitioner's brief made it clear that he did not contest the sufficiency of the evidence when the confession was included. Point IV of the brief, which argued that the evidence was insufficient (see Pet. App. 17-20), stated: "As to the confession which was the subject of Point I and Point II of this brief, *supra*, it suffices to say that it was incompetent and inadmissible to prove the existence of the conspiracy and the defendant's participation therein."

the remaining evidence was insufficient to support his convictions, and that therefore the Double Jeopardy Clause barred reprosecution. The district court denied that motion, and the court of appeals affirmed (Pet. App. 1-6). The court of appeals rejected the claim that its previous decision had in effect found the evidence to be insufficient without the inadmissible confession (*id.* at 2-3). The court then held (*id.* at 3-6) that when a conviction is reversed for error in the admission of evidence, the sufficiency of the evidence need not be examined because retrial would be permitted even if the remaining evidence was insufficient. This was so, the court stated (*id.* at 6), because "we cannot know what evidence might have been offered if the evidence improperly admitted had been originally excluded by the trial judge."

2. The evidence at trial, excluding the confession ruled inadmissible on appeal, showed that in October 1978 DEA Agent Ismael Fuentes posed as a major drug dealer in the area of Corpus Christi, Texas (Tr. 186, 208). Robert Aguilar told Fuentes that he could furnish up to five kilograms of cocaine on a weekly or bi-weekly basis, but that the first sale would be limited to a single ounce (Tr. 195, 200). Aguilar also told Fuentes that he obtained his cocaine from Lauro Ybanez and that Ybanez' source of supply was his brother-in-law, who resided in Miami, Florida (Tr. 195, 202). Because Fuentes refused to purchase just one ounce, Aguilar placed him in telephone contact with Ybanez, who confirmed that his source came from Miami (Tr. 203-205).

On October 30, Aguilar and Fuentes met in San Antonio. Aguilar again placed a telephone call to Ybanez and permitted Fuentes to speak with Ybanez about purchasing two kilograms of cocaine (Tr. 213-217). Fuentes and Ybanez agreed that the transaction would take place in Miami. Ybanez said that his brother-in-law, whom he called Oscar (petitioner's middle name), was the source of the cocaine (Tr. 218). Later that night, Ybanez told Fuentes that he had

spoken with his brother-in-law and that everything was ready (Tr. 219). Aguilar provided Fuentes with a telephone number in Miami where he and Ybanez could be reached (Tr. 220).

Aguilar and Ybanez flew to Miami on November 1. DEA agents observed petitioner meet Aguilar and Ybanez at the airport in a Cadillac and transport them to three locations, the last of which was petitioner's residence. Ybanez and Aguilar remained at the residence for about 15 minutes and then drove off in a Buick, which was also owned by petitioner (Tr. 339-342, 349-350, 359).

Fuentes also arrived in Miami on November 1 and checked into the Sheraton Inn River House Hotel near the airport. After ascertaining that the number provided by Aguilar was for a telephone located at Oscar's Restaurant and Lounge (petitioner's place of business), Fuentes called the number and spoke with Aguilar, who said that he, Ybanez, and the latter's brother-in-law were at the restaurant. Aguilar expressed concern that he and Ybanez had been followed by law enforcement officers after leaving the airport and suggested that the transaction be put off until the next day (Tr. 220-225, 350).

At 6:45 p.m. on November 2, Aguilar and Ybanez met Fuentes and undercover agent Nick Zapata in the lobby of the Sheraton Inn River House Hotel. While Aguilar remained in the lobby, Ybanez proceeded with the agents to their motel room in order to inspect the purchase money. While in the room, Ybanez told the agents that Oscar, his brother-in-law, was awaiting the imminent arrival of a shipment of 17 kilograms of cocaine (Tr. 228, 256, 258).

After examining the agents' money, Ybanez made a telephone call to an individual whom he called both Luis and Oscar (Tr. 260). Ybanez then told the agents that "Mr. Sarmiento" wanted the transaction to occur elsewhere (Tr.

259). When the agents refused, Ybanez made another telephone call and told the agents that the party on the telephone line wanted to speak with one of them (Tr. 298). Zapata took the telephone and spoke with someone who called himself Luis (petitioner's first name) (*ibid.*). After reiterating that he and Fuentes would not proceed to another location, Zapata returned the telephone to Ybanez. At the end of his telephone conversation, Ybanez told the agents, "He will be here about 9:00 o'clock with the cocaine" (Tr. 300).

At approximately 9:30 p.m. petitioner arrived at the Sheraton Inn River House Hotel. He drove his Cadillac around the front of the motel for several minutes and then proceeded to the parking lot of a Ramada Inn located one-half block away (Tr. 343, 352, 361). At this time Ybanez, who was still in Fuentes' motel room, received a telephone call. After the call, Ybanez said that the "stuff" had arrived (Tr. 301-302). Ybanez remarked, "He is here. He's across the street. I will be back later" (Tr. 260). Ybanez and Aguilar left the room and drove the Buick to the Ramada Inn parking lot, where they met petitioner. Aguilar removed a box from the open trunk of petitioner's car and then closed the trunk. He and Ybanez then returned with the box to the Sheraton Inn River House Hotel while petitioner drove home (Tr. 344-345).

Aguilar and Ybanez entered Fuentes' motel room with Ybanez carrying the box. Ybanez told Fuentes, "[h]ere it is" (Tr. 261-262). While Zapata was testing the powder contained in the box, Fuentes asked Ybanez whether he could speak with his brother-in-law about arranging to purchase a larger quantity. Ybanez said, "[t]he man just brought the cocaine over and he had to leave, so I can't let you talk to him now, but we will work it out later" (Tr. 262). After Zapata confirmed that the powder was cocaine, Ybanez and Aguilar were arrested (Tr. 262-263). Petitioner was arrested at his home less than an hour later (Tr. 345).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Relying on *Burks* v. *United States*, 437 U.S. 1 (1978), and *Greene* v. *Massey*, 437 U.S. 19 (1978), petitioner contends (Pet. 8-22) that the Double Jeopardy Clause precludes retrial following the reversal of a conviction based upon the improper admission of evidence unless the remaining evidence is sufficient to support conviction. He therefore maintains that the court of appeals erred in refusing to review the sufficiency of the lawfully admitted evidence at his first trial. Petitioner's arguments lack merit.

It has long been established that retrial is generally allowed when a defendant's conviction is reversed on appeal. See *United States* v. *DiFrancesco*, 449 U.S. 117, 131 (1980); *United States* v. *Ball*, 163 U.S. 662, 672 (1896). *Burks* and *Greene* "carved a narrow exception from the understanding that a defendant who successfully appeals a conviction is subject to retrial" (*Tibbs* v. *Florida*, No. 81-5114 (June 7, 1982), slip op. 10). In *Burks*, this Court held for the first time that retrial is barred when a federal conviction is reversed for insufficient evidence. In *Greene*, the same principle was held applicable to the states, and in that case the Court expressly declined to comment upon the issue now raised by petitioner (437 U.S. at 26 n.9).

There is nothing in the reasoning of *Burks* or *Greene* that supports petitioner's argument. Noting that a new trial is not permitted when the trial court recognizes that the evidence is insufficient and therefore grants an acquittal, the Court in *Burks* stated (437 U.S. at 11; emphasis in original) that "it should make no difference that the *reviewing* court,

rather than the trial court, determined the evidence to be insufficient." The Court elaborated (*id.* at 16; emphasis in original):

> [S]uch an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

This reasoning is obviously inapplicable where, as here, a defendant contends following the reversal of his conviction for error in the admission of evidence that the remaining evidence was legally insufficient. In that situation, the defendant would not necessarily have been acquitted if the trial judge had not erred. On the contrary, if the trial judge had excluded the evidence subsequently held to have been admitted improperly, the prosecution might have been able to establish a proper basis for admitting that evidence or the prosecution might have been able to introduce other evidence of similar import. In the present case, for example, Aguilar, who had already pleaded guilty, could have been granted immunity and questioned concerning the crime.

Not only is the reasoning of *Burks* and *Greene* inapplicable in a case such as this, but barring retrial under the circumstances presented here would have untoward consequences. The government would be compelled to introduce evidence so that retrial would not be precluded if the trial judge's rulings on important items of proof were held on appeal to have been error. The government would also feel obligated, whenever possible, to establish alternative bases for admitting all critical pieces of evidence. The result

would be a waste of scarce judicial and prosecutorial resources, increased delay in the criminal process, and a greater likelihood of jury confusion resulting from the introduction of cumulative evidence.

For these reasons, the Fourth and Ninth Circuits, as well as the Fifth, have rejected the double jeopardy argument upon which petitioner now relies. *United States* v. *Harmon*, 632 F. 2d 812 (9th Cir. 1980); *United States* v. *Block*, 590 F. 2d 535, 543-544 (4th Cir. 1978).

2. Petitioner mistakenly relies (Pet. 14-16) upon *United States* v. *McQuilkin*, 673 F. 2d 681 (3d Cir. 1982), and *United States* v. *United States Gypsum Co.*, 600 F. 2d 414 (3d Cir.), cert. denied, 444 U.S. 884 (1979). In those cases, the court of appeals did not review the sufficiency of the properly admitted evidence following the reversal of convictions based upon error in the admission of certain items of proof. Instead, the court, following reversal of convictions on grounds unrelated to the admission of evidence, reviewed the sufficiency of *all the evidence* admitted at the first trial.

In *McQuilkin*, the defendants' convictions before a magistrate were reversed by the district court on the ground that the defendants' statutory right to a jury trial had been denied (673 F. 2d at 682). The defendants then moved for dismissal of the indictment on double jeopardy grounds, but the district court found that the evidence against all but one of them was sufficient and remanded for a new trial. On appeal, the court of appeals held (*id.* at 683-687) that the defendants could appeal the district court's decision under *Abney* v. *United States*, 431 U.S. 651 (1977) (pretrial order denying motion to dismiss on double jeopardy grounds appealable under 28 U.S.C. 1291). The court then concluded (673 F. 2d at 687-688) that the evidence at the first trial was legally sufficient.

In *United States Gypsum Co.*, convictions were reversed based upon an erroneous jury instruction and an improper ex parte meeting between the trial judge and the jury foreman. See *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), aff'g 550 F. 2d 115 (3d Cir. 1977). On remand, the defendants' motion to dismiss the indictment on double jeopardy grounds was denied by the district court, and the court of appeals affirmed, holding that the evidence at the first trial was sufficient (600 F. 2d at 417-420).

Here, by contrast, petitioner did not contest the sufficiency of the evidence (including the confession) admitted at his first trial (see page & note 1, *supra*). If he had raised such a claim, the court of appeals would undoubtedly have considered it, since a reversal on that ground, unlike a reversal for improperly admitted evidence, would have barred reprosecution. Instead, however, petitioner merely asserted that the evidence was insufficient without the confession. Since that assertion, even if factually correct,[2] would not have precluded retrial, the court of appeals properly declined to pass upon it.

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[2]In fact, the remaining evidence, when viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80, 1942)), was ample. Although petitioner was never shown to have been present when cocaine was in plain view, the evidence of his intimate association with Aguilar and Ybanez, who had travelled from Texas to petitioner's home and place of business in Miami for the sole purpose of effecting a sale of a large quantity of cocaine, coupled with the proof of petitioner's arrival at the time set for the drug transaction and his delivery of the box containing a large amount of cocaine, provided an adequate basis for the jurors to conclude rationally that guilt was established beyond a reasonable doubt. See *United States* v. *Grayson*, 597 F. 2d 1225, 1229 (9th Cir.), cert. denied, 444 U.S. 875 (1979); *United States* v. *Ochoa*, 609 F. 2d 198, 203 (5th Cir. 1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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